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ABSTRACT

A case review study of court decisions concerning public employees' constitutional right of free speech yields conflicting and sometimes disturbing results. The most often cited precedent in these decisions is the 1968 Supreme Court ruling in "Pickering v. Board of Education" in which a letter from a school teacher to a newspaper criticizing a school board decision was found to be protected speech. However, "Pickering" balances the free speech rights of the employee against the need for organizational efficiency. In writing the opinion, Justice Marshall declared that this "Pickering balance" must be applied on a case by case basis. A 1979 Supreme Court decision, "Givhan v. Western Line Consolidated School District," extended protection to internal speech communication not aimed at the general public. A survey of court decisions, however, reveals that even this modified "Pickering balance" often yields decisions in which matters of coworker harmony, the superior/subordinate relationship, and organizational reputation outweigh free speech protection. Although courts have made the analogy between protected speech in society and in organizations, they have preferred the "ad hoc" balancing of the "Pickering" test over the implications of the analogy itself. Extending the analogy while protecting employer rights through special provisions would yield better results and simplify the courts' tasks. (JL)

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CONSTITUTIONAL FREE SPEECH PROTECTIONS FOR THE PUBLIC EMPLOYEE: CLOSE ENOUGH FOR GOVERNMENT WORK?

BY

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I. INTRODUCTION

In the 1882 case of *McAuliffe v. Mayor of New Bedford*, Oliver Wendall Holmes Jr. made his first famous remark about free speech. He said, "The petitioner may have the constitutional right to talk politics but he has no constitutional right to be a policeman."[1] While the phrase retains its literary sparkle, its legal standing has been significantly tarnished during the past decade. Free speech by public employees, including police officers, is now considered to be entitled to at least some First Amendment protection.

The benchmark decision which started this trend was the 1968 Supreme Court ruling in *Pickering v. Board of Education*.[2] In *Pickering*, a public school teacher wrote a letter to a local newspaper criticizing the school board for backing a certain bond referendum. The Court ruled that the letter fell within the scope of First Amendment protection. Since *Pickering*, there have been nine major Supreme Court decisions and over one hundred-ninety Court of Appeals decisions in cases concerning freedom of speech for public employees. Although First Amendment protection is not absolute in these cases, the decisions indicate that contemporary courts are willing to extend Constitutional protections to public employees.

In order to understand this trend, it is necessary not only to examine the changes in Constitutional protection afforded public employee speech, but also to consider the assumptions about employee speech which undergird these changes. This essay will examine: 1) the interests at stake in public employee free speech controversies, 2) the

means by which the courts are attempting to resolve conflicting interests, and 3) the setting of standards which must be met to prove that an employee was punished in retaliation for protected speech. Underlying these issues, however, is a more basic question: Can freedom of speech and organizational efficiency co-exist and if not, which should be given preference?

This study looks at organizational communication from a legal perspective. This approach might be attractive to organizational communication scholars as a way to broaden thier theoretical viewpoint. Organizational communication is often studied in terms of how it enables organizations to meet their goals. According to legal theory, however, the function of organizational communication extends beyond simply meeting organizational goals, into the realm of meeting societal goals and providing personal freedom.

In addition, the workmethod used in legal study might be of interest to those organizational communication scholars who are not completely satisfied with their workmethods when attempting to understand the contingent factors which influence organizational communication. In an effort to compensate for these shortcomings, some researchers are going back to serious case study in order to account for as many contingent factors as possible.[3] The legal approach has traditionally used the case method, which is in many respects similar to the social science case study. Perhaps this legal approach might provide an interesting and heuristic counterpoint to the more common methods of organizational communication study.

Limitations of the Study

This study will be limited to the Constitutional protections applied to the statements of public employees. Although some free speech

protection is available in statutes and the common-law concept of the employment relationship, these protections will not be examined.

The study is limited to public employees because the First Amendment says, "*Congress* shall make no law [emphasis mine] . . . ."[4] Private sector employees fall without the scope of First Amendment protections except in rare situations where "state action" is involved.[5]

Nonverbal communication and loyalty oaths are also excluded here. This will enable a more specific focus on direct statements made by employees.[6]

II. THE INTERESTS AT STAKE

In *Pickering v. Board of Education*, Marvin Pickering sought reinstatement after being dismissed for publishing a letter critical of ". . . the School Board's handling of bond issue proposals and its subsequent allocation of financial resources between the school's educational and athletic programs. It also charged the superintendent of schools with attempting to prevent teachers in the district from opposing or criticizing the proposed bond issue."[7]

Justice Marshall, writing for the Court, found that two interests are at stake and must be "balanced" in public employee free speech cases. The first is the interest of the public employee in " . . . commenting upon matters of public concern . . . " and the second is the interest " . . . of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[8]

Marshall ruled that a balance must be applied to these interests on

a case by case basis. He refused to lay down a general standard but did intimate that factors such as discipline, co-worker harmony, confidentiality, personal loyalty, and confidence might be considered in such a balancing.[9]

However, with regard to the specific facts of the *Pickering* case, Marshall found that, " . . . the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication . . . ." Marshall found it necessary to, ". . . regard the teacher as the member of the general public he seeks to be."[10] Thus, there was no issue of the employee hurting the organization in his capacity as a schoolteacher. The only remaining issue was whether his letter was protected speech even though it contained several inaccurate statements.

Marshall found guidance in the libel case of *New York Times v. Sullivan*.[11] Applying the *New York Times* test, Marshall held that," . . . in a case such as this, absent proof of false statements knowingly, or recklessly made by him, a teacher's exercise of his rights to speak on issues of public importance may not furnish the basis for his dismissal from public employment. Since no such showing has been made . . . his dismissal . . . cannot be upheld."[12]

Thus, Marvin Pickering won back his job. Yet the case did not answer questions such as: Is speech on the job and to a private audience protected? What types of expression would lead to organizational inefficiencies?

Commenting Upon Matters of Public Concern

Pickering dealt with communication external to the organization, and aimed at the public at large. However, is communication within an organi-

zation, that is not aimed at the general public, also considered to be "comments upon matters of public concern?" The courts held different opinions about this question until the United States Supreme Court finally resolved the issue in *Givhan v. Western Line Consolidated School District*, in 1979.[13]

Several Circuits had found that internal speech communication not aimed at the general public was protected speech. For example, Judge Bright, in the Eighth Circuit case of *Geringer v. Center School District No. 58*, found that a report by a teacher on the district's financial ability to raise salaries was protected despite the fact that it was delivered to fellow teachers in a teachers' association, and not to the general public.[14]

In the Fourth Circuit case of *Janetta v. Cole*, a Rock Hill, North Carolina firefighter was dismissed for circulating, and then presenting to the Rock Hill City Manager, a petition protesting a promotion in the fire department. Judge Haynsworth ruled that the dismissal was in violation of the firefighter's First Amendment rights.[15]

On the other hand, some Circuits had felt that internal communication, not aimed at the public at large, fell outside of the phrase, "commenting upon matters of public concern," and hence, did not warrant First Amendment protection. For example, the Tenth Circuit found, in *Fisher v. Walker*, that a firefighter's letter in a union publication did not merit protection. The letter was critical of the formation of an Officers' Association which broke away from the International Association of Firefighters' Local Union No. 1645, and hence was considered to discuss a matter of ". . . departmental rather than of general interest . . . ."[16]

Judge Winner, writing for the Court, contrasted the communication aimed at the general public, in *Pickering*, with the communication of firefighter Jim Fisher, which he characterized as communication aimed at other organizational members.

> In *Pickering*, the teacher's criticism was of a widely publicized and openly debated school board policy concerning expenditure of public funds, and the Court noted that Pickering's statements were not directed towards anyone with whom he normally would be in contact during the course of his work. Here, of course, Fisher's criticisms were aimed squarely at his immediate supervisors and the immediate supervisors of most union members . . . .[17]

This was a major factor in the decision to uphold Fisher's five day suspension.

In *Roseman v. Indiana University of Pennsylvania*, the Third Circuit faced a situation where Eleanor Roseman, a non-tenured associate professor, claimed that she was denied tenure because of her complaints to the college dean and to the faculty of her department concerning the acting department chairman's alleged wrongful suppression of an application for chairmanship. Judge van Dusen was careful to separate the private communication and disruptive impact as two distinct issues.

> The communications made by the plaintiff in the case before us differ from Pickering's in two crucial

> aspects. In the first place, Roseman's expressions were essentially private communications in which only members of the Foreign Language Department and the Dean of the College of Arts and Sciences were shown by the plaintiff to have had any interest . . . . As Roseman's communications were made in forums not open to the general public and concerned an issue of less public interest than Pickering's, the First Amendment interest in their protection is correspondingly reduced. The second respect in which Roseman's communications differ from Pickering's is in their potentially disruptive impact on the functioning of the department.[18]

Professor Roseman did not receive tenure.

Finally, the Fifth Circuit, in *Ayers v. Western Line Consolidated School District*, in 1977, ruled that a series of complaints concerning racially discriminatory employment practices, which were made privately to the school principal, were private communication and thus not protected by the First Amendment.[19] Two years later the case would reach the Supreme Court under a new name: *Givhan v. Western Line Consolidated School District.*[20]

In the *Givhan* case, the Supreme Court, by unanimous decision, ruled that internal communication aimed at private audiences was entitled to First Amendment protection. Justice Rehnquist, writing the opinion of the Court, held that although the Supreme Court cases of *Pickering*, *Perry v. Sindermann*, and *Mt. Healthy City Board of Education v. Doyle*

were concerned with communication to the public, those rulings did not exclude private communication from First Amendment protection.[21] Rehnquist wrote:

> This Court's decisions in *Pickering*, *Perry*, and *Mt. Healthy* do not support the conclusion that a public employee forfeits his protection against governmental abridgement of freedom of speech if he decides to express his views privately rather than publicly. While those cases arose in the context of a public employee's public expression, the rule to be derived from them is not dependent on that largely coincidental fact.
>
> . . . .
>
> Neither the First Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately, with his employer rather than to spread his views before the public.[22]

Although Rehnquist ruled that both internal and external communication are protected and can therefore be inserted into a *Pickering* balancing test, he was careful to point out that internal communication brings some special problems to the balance. In footnote four, Rehnquist wrote: "Private expression, however, may in some situations bring additional factors to the *Pickering* calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional

efficiency may be threatened not only by the content of the employee's message but also by the manner, time and place in which it is delivered."[23]

In sum, either externally or internally directed communication is included in the concept of an employee commenting "upon matters of public concern," and therefore protected by the First Amendment. Yet it is not clear whether or not internal communication is as vital an interest as external communication.

It is apparent that the Supreme Court looks at speaking out by the employee as vital in the regulation of government organizations by the public. In *Pickering*, Marshall argued that the judgement of the school administration should be tested by public debate, which he referred to as " . . . the core value of the Free Speech Clause of the First Amendment."[24] Moreover, Marshall thought that the most important voices in that debate were those of public employees. He wrote:

> Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely without fear of retaliatory dismissal.[25]

The *Givhan* decision made it clear that private expression has First Amendment value and must be placed in a *Pickering* balance to be weighed against harm to organizational efficiency. However, Rehnquist's opinion in *Givhan* does not explain whether private expression rises to the level of "core value of the First Amendment."

Promoting the Efficiency of Public Services

The second element in the *Pickering* balance is the interest of the State in, "promoting the efficiency of public services." In order to weigh the interest of organizational efficiency against free speech interests, the courts must decide what types of expressive behaviors, what conditions, cause organizational inefficiency. Drawing such a causal link (or series of causal links) is an ambitious task.

In *Pickering*, the Court's implications suggest five factors to be considered in the *Pickering* balance: 1) discipline, 2) co-worker harmony, 3) confidentiality, and 4) personal loyalty and personal confidence between superior and subordinate.[26] In *Givhan*, the Court added that time, place, and manner of expression might also be placed in the *Pickering* calculus.[27] In addition the lower courts in effect added the catagory hurting the good name of the organization.

In neither case was the Court willing to set any general principle or rule to aid the lower courts in establishing causal links between expressive behaviors and organizational inefficiencies. As a result, the lower courts are still struggling to flesh out the scant suggestions made in *Pickering* and *Givhan*. Examining cases where speech was outwieghed by each of the six factors makes the nature of the struggle clear.

In this section, only cases where the courts have found speech to damage organizational efficiency to such an extent that it outweighs any speech interest, will be examined. In the next section, cases where speech interests outweighed damage to organizational efficiency will be examined for comparison.

The first factor that the courts have found to damage efficiency is

a lack of discipline. The courts have found that speech can damage discipline when it impedes actions ordered by authorities.

For example, in the Sixth Circuit case of *Whitsel v. Southeast Local School District*, a speech made to an unauthorized gathering of high school students by a teacher was viewed as harmful to efficiency because it was felt that it was the teacher's duty to get the students to return to classes.[28]

On May 4, 1970, Whitsel, a high school teacher with seven years' experience, gave permission to two teaching assistants whom he supervised to leave the school early to participate in the tragic Kent State anti-war rally. The two assistants were then fired for not receiving the approval of the principal. The next day, about 400 students gathered in the Southwest High School auditorium and demanded an explanation of the firings. The principal ordered the students to return to classes, but they refused. Whitsel addressed the assembly and suggested that there may have been political overtones to the dismissals.[29] Judge McCree found that Whitsel had no First Amendment right to disobey the principal by failing to urge the students to return to classes.

The second category of inefficiency, suggested by the Supreme Court, is damage to co-worker harmony. The theory here is that if speech causes disharmony among co-workers, ineffieiencies result.

In *Fisher v. Walker*, a firefighter criticized his fellow firefighters for breaking off from the local union and forming the Officers' Association. The case was significant not only with regard to the external/internal communication question posed, but also in terms of co-worker harmony.[30] On the basis of testimony in the trial court, Judge Winner of the Tenth Circuit found Fisher's letters to be disruptive:

> The chief and officers of the Salt Lake City Fire Department testified to the disruptive impact of the letters on the morale of and relationships within the police department. Their testimony was contradicted but the trial judge saw and observed the witnesses, and his findings of fact will not be disturbed if supported by the record.[31]

Thus, the proof of disruptive conduct was essentially provided by the people who suspended him. Judge Winner applied the *Pickering* balance and upheld the firefighter's five day suspension. It is ironic that, in his letter, Fisher lamented, " . . . both officers and privates lose because a divided department causes morale problems . . . ," yet injury to morale was the very reson for his suspension.[32]

In the case of *Janusaitis v. Middlebury Volunteer Fire Department*, the Second Circuit found that carping criticism is harmful to co-worker harmony.[33] In the case, Robert Janusaitis, a volunteer firefighter, leveled charges to a governing body that " . . . morale was low, that training and discipline were inadequate, that accounting procedures deviated from generally accepted accounting principles, and that his past recommendations on these subjects had been ignored."[34] Later, Janusaitis sent a letter to the Internal Revenue Service complaining about the fire department's accounting procedures. He was suspended. After his return to the department, he threatened to send another letter to the news media, and granted interviews with reporters. He was then dismissed.

Judge Gurfein ruled that, " . . . when lives may be at stake in a fire, an *esprit de corps* is essential to the success of the joint endeavor. Carping criticism and abraisive conduct have no place in a small organi-

zation that depends upon common loyalty [and] 'harmony among co-workers' . . ."[35] Judge Gurfein upheld Janusaitis' suspension and ultimate dismissal.

The third category of inefficiency, suggested by the Supreme Court, is a breach in confidentiality. While it is not hard to imagine types of information which should not be revealed to the public, blanket prohibitions might interfere with legitimate information reaching the public.

In the case of *Hanneman v. Breir*, the Seventh Circuit had an opportunity to rule on a Milwaukee Police Department regulation prohibiting premature disclosure of police business.[36] However, the Court was able to rule on other grounds and avoid a direct ruling on the regulation.

In the case, the Seventh Circuit viewed infromation leaks as a discipline problem. The case arose when members of the Milwaukee Professional Policeman's Protective Association distributed a letter to the mayor, the city council, the city's labor negotiator, and the state labor board, which said that the Association was being investigated by the police department concerning its political activities. The day before, the *Milwaukee Journal* had run a front page story about the investigation.

Judge Hastings found that a confidentiality rule " . . . prevents improper use of inside information obtained in the course of public employment. The rule curtails the publication of innacurate or misleading statements which might result from premature disclosure of pending matters. It further insures that the public will not erroneously attribute to the police department a statement made by a single officer without official sanction."[37] However, in light of the newspaper story

preceeding the letter, Judge Hastings found that the " . . . chief of police had not demonstrated a need to enforce the confidentiality rule . . . which outweighs the individual and public interest in expression."[38]

The fourth category of inefficiency suggested by the Supreme Court is breach of personal loyalty and personal confidence. The theory here is that direct criticism of a superior by an employee might destroy the working relationship between the superior and the subordinate and hence destroy efficiency.

In the Ninth Circuit case of *Kannisto v. the City and County of San Francisco*, a police lieutenant, during morning inspection, addressed his subordinates and described his superior as " . . . a most 'unreasonable, contrary, vindictive individual,' whose behavior 'was unreasonable, belligerent, arrogant, contrary and unpleasant.' Kannisto also said that his superior officer had given him improper orders on several occassions which Kannisto had intentionally disobeyed."[39] Lieutenant Kannisto was suspended for fifteen days for his remarks.

Judge Wright ruled that " . . . Kannisto's diatribe, delivered as it was before his men while in formation for inspection can be presumed to have had a substantial disruptive influence on the regular operations of the department."[40] It is interesting to note that Judge Wright presumed inefficiencies were caused by the remarks and did not look for actual inefficiencies. He then inserted these presumed inefficiencies into the *Pickering* balance and ruled against Kannisto.

In *Sprague v. Fitzpatrick*, the Third Circuit ruled on a case where a first assistant district attorney had accused the district attorney of lying. Assistant district attorney Richard Sprague had continually sought

a prison sentence for a convicted criminal since 1969.[41] In 1974, newly elected district attorney F. Emmett Fitzpatrick--who had represented the criminal's co-defendent on a blackmail charge while in private practice--intervened in the case, and recommended probation to the sentencing judge. Later, Fitzpatrick denied responsibility for the decision, arguing that it was the idea of subordinates who worked on the case. When a reporter for the *Philadelphia Inquirer* questioned Sprague about Fitzpatrick's claims, Sprague sharply disputed the truth of each. Fitzpatrick demanded Sprague's resignation and when he refused, fired him.

Judge Hunter ruled that " [Sprague] declared in public that his immediate superior had not told the truth. Certainly we could not expect a district attorney to run an efficient office if his first assistant were free to impugn his integrity in public."[42] Judge Hunter went on to apply the *Pickering* balance and to uphold Sprague's dismissal, ruling that even though " . . . it is true that Sprague's interview . . . concerned matters of grave public import . . . , this does not tilt the *Pickering* balance in favor of first amendment protection where, as here, the effectiveness of the employment relationship between employee-speaker and employer-target is so completely undermined."[43] The evidence Judge Hunter used to show a disruption of Fitzpatrick and Sprague's working relationship was " . . . Fitzpatrick's immediate dismissal of Sprague and Sprague's failure to seek reinstatement as a form of relief . . . ."[44]

In *Smalley v. City of Eatonville*, Wayne Smalley (a white man) was hired as the town's financial director and reported directly to Mayor Nathaniel Vareen (a black man).[45] Smalley was fired for, among other things, "writing a letter to a CETA officer complaining of 'intolerable

conditions caused by racial bias existing in Eatonville' and insinuating that the Mayor might manufacture evidence of misconduct to justify firing him.'"[46]

Judge Goldbold, of the Fifth Circuit, held that, ". . . Smally's letter . . . threatened serious disruption of a working relationship requiring cooperation and loyalty. In these circumstances dismissing Smally did not offend the constitution."[47] Here again, the standard applied was not actual disruption, but rather "threatened" disruption.

In *Brousseau v. United States*, Robert Brousseau, the chief of the management and budget division of the Region VIII Office of the Community Services Administration (U.S. Government), objected to a reorganization plan which would eliminate the management and budget division. Brousseau moved before a union meeting that the plan should be rejected. He further circulated a petition opposing the plan among employees.[48] Judge Smith of the United States Court of Claims found it essential that Brousseau meet his duty of loyalty to David Vanderburgh, who was director of the Region VIII Office and Brousseau's immediate superior.

Smith also expounded on the strict hierarchical discipline needed to run an organization. Smith wrote:

> One of Vanderburgh's proposals was that the management and budget office be eliminated. By preparing and circulating the petition opposing the proposal, plaintiff violated the duty of loyalty which he owed to Vanderburgh. By violating this duty of loyalty, plaintiff eviscerated any trust or confidence which Vanderburgh had in him. The loss of such trust or confidence made a close working relationship between the two men impossible.

. . . .

> Management cannot function effectively unless it operates "with one voice" *vis-a-vis* others. For management to countenance disloyalty in such situations would be for management to render itself impotent.[49]

Smith used the *Pickering* balance and affirmed Brousseau's demotion from GS-15 at a salary of $40,955 per year to GS-13 with a salary of $33,825.

In the 1979 case, *Givhan v. Western Line Consolidated School District*, Justice Rehnquist suggested that time, place, and manner problems should be a fifth category of inefficiency.[50] The Circuits had actually been using time, place, and manner rationales for some time, but Rehnquist reinforced their legitimacy.

The time, place, and manner rationale can be applied in a number of ways. One rationale is that an employee's behavior off the job is so bad that it reflects poorly on the employee and the organization; thus making it difficult for the employee to work at an efficient level.

The 1972 case of *Duke v. North Texas State University* involved a teaching assistant, Elizabeth Duke, who was fired for using profane language in comments which were disrespectful to the University Administration.[51] At an unauthorized and unsponsored group meeting held in a park on the campus of North Texas State University, Duke allegedly referred to the Board of Regents as a," . . . 'stupid bunch of m----- f-----s' . . .," among other things.[52]

Judge Ainsworth, of the Fifth Circuit, overturned the district court decision by ruling that " . . . Mrs. Duke owed the University a minimal

duty of loyalty and civility to refrain from extremely disrespectful remarks aimed at the administrators of the University. By her breach of this duty, the interests of the University outweighed her claim for protection."[53]

In the case of *Megill v. Board of Regents of the State of Florida*, the Fifth Circuit ruled that the denial of tenure to Professor Kenneth Megill for, among other things, using profanity and disrupting a meeting, did not abridge his First Amendment rights.[54] Dr. Megill allegedly responded to a panel discussion on student dissent, sponsored by the Yale Club and held in a local hotel, by using profane terms.

Judge Butzner held that " . . . the record fully supports the nature of Megill's conduct at the meeting and the disruptive effect it had. This conduct can appropriately be used by the board to evaluate the competence of a teacher without violating any First Amendment right."[55] Judge Butzner then applied the *Pickering* balance and upheld the denial of tenure to Megill.

In addition to off the job speech, inappropriate on the job speech has also been found to damage efficiency.

The 1974 case of *Phillips v. Adult Probation Department, City and County of San Francisco* involved a deputy probation officer who was suspended for five days for refusing to remove a poster favorably depicting H. Rap Brown, Angela Davis, and Eldridge Cleaver--who at the time were being sought by the Federal Bureau of Investigation.[56] Judge Jameson of the Ninth Circuit found that Nelson Phillips' " . . . supervisor could reasonably conclude . . . that it was inconsistant with appellant's function as a probation officer to place on the walls of his office a poster favorably depicting persons who were fugitives from

justice."[57] Judge Gurfein then applied the *Pickering* balancing test and concluded that " . . . the governmental interest in promoting the efficiency of the public service outweighs appellant's asserted rights of expression 'during work hours and on work premises' . . . ."[58]

In *Adamian v. Lombardi*, an assistant professor of English at the University of Nevada-Reno was involved in a march around the campus stadium in protest against the Cambodian invasion and the Kent State shootings.[59] The march took place during "Governor's Day" ceremonies.

> The protest went beyond the march, however. Adamian (yelling, 'Let's stop this mother------.') and others tried to stop a motorcade bringing officials for the ceremonies into the stadium; led by Adamian the demonstrators then made loud noises to disrupt the ceremonies. Still later, Adamian left the stands, joined a group on the field and motioned other demonstrators onto the field, thus creating a danger of violent confrontation between two bodies of people.[60]

Judge Poole, writing for the Ninth Circuit, adopted the view the District Court had developed: that Adamian's acts had caused a substantial and material disruption of a university function. Judge Poole found that Adamian's dismissal for the protest did not deny his freedom of speech.[61]

In *Ayers v. Western Line Consolidated School District*, which later reached the United States Supreme Court as *Givhan v. Western Line Consolidated School District*, the Fifth Circuit found that no one has a right to force ideas on an unwilling recipient.[62] Judge Gewin found that Bessie Givhan's complaints to her principal, concerning employment policies which she thought to be racially discriminatory, were outside of First Amendment

protection because constitutional rights do not include pressing even "good" ideas on an unwilling recipient.

When the case reached the Supreme Court, however, Justice Rehnquist found that the "captive audience" rationale did not apply to the case. He wrote, "Having opened his office door to petitioner, the principal was hardly in a position to argue that he was the 'unwilling recipient' of her views."[63] Thus, the question of when--if ever--the captive audience rationale applies to work settings is left unresolved.

Finally a sixth category of inefficiency as been developed by the lower courts but has not been mentioned by the Supreme Court. This involves speech whose content might be erroneously attributed to a government agency and creates an embarrassment to that agency.

In the time, place, and manner cases of *Duke v. North Texas State University*,[64] *Megill v. Board of Regents of the State of Florida*,[65] and *Adamian v. Lombardi*,[66] the circumstances of the speech was the important factor. The expression was felt to be of such a raucous and inappropriate nature that it discredited the employees and their agencies. However, in this category, the content as well as the circumstances of the speech, is important. The courts have ruled that embarrassment to an agency can result from something as simple as misusing a letterhead or as extensive as employees actively campaigning for social issues in their off duty hours.

In the Eighth Circuit case of *Long v. Board of Education of the City of St. Louis*, a teacher was refused reemployment because she wrote a letter on school board stationery without making it clear that she was not acting on behalf of the board.[67] Jane Hanneken sent a letter, written on school stationery, to her representative in the state legislature. The letter protested the Missouri Department of Education's

failure to fund a summer program in which Hanneken was involved. "Later Ruby Long, Mrs. Hanneken's supervisor, refused to sign an evaluation showing Mrs. Hanneken to be unsatisfactory in performance . . ." and she, also, was not reappointed.[68] In a *per curiam* opinion, the Court found that the letter, on school stationery, " . . . could have created the impression that the St. Louis Board of Education was critical of the allocation of funds . . . ."[69] The Court then applied the *Pickering* balance and found that because " . . . Mrs. Hanneken failed to make it clear that she was not acting on behalf of the Board, and because she exceeded her authority as a teacher, the balance in this case is clearly struck in favor of efficient administration of the school district."[70]

The Court went on to uphold Ruby Long's nonrenewal on the theory that she was insubordinate in refusing to comply with her superiors' orders to give Hanneken poor evaluations concerning her unprotected speech.

In *McConnell v. Anderson*, the Eighth Circuit ruled that a homosexual who decided to take an activist role in pursuing homosexual conduct--including an attempt to marry another man--could not claim First Amendment protection.[71] James McConnell applied for a promotion to head the cataloguing division of the University of Minnesota's St. Paul Campus library. His application was denied, allegedly because of his public professions of his homosexuality. McConnell was " . . . well educated and otherwise able, and possessed both an academic degree and a master's degree."[72] Judge Stephenson ruled that McConnell wasn't fired because he was a homosexual, but because he attempted to " . . . pursue an activist role in *implementing* his unconventional ideas concerning the societal status to be accorded homosexuals and thereby, to foist tacit

approval of this socially repugnant concept upon his employer, who is in this instance, an institution of higher learning."[73] Judge Stephenson went on to say that, "We know of no Constitutional fiat or binding principle of decisional law which requires an employer to accede to such extravagant demands."[74]

In *Singer v. United States Civil Service Commission*, the Ninth Circuit was faced with a homosexual clerk typist of the Seattle Office of the Equal Employment Opportunity Commission, whose employment was terminated because of his open homosexual way of life.[75] Among other things, John Singer had kissed another male in front of the elevator of the building of a former employer, appeared in an article in the *San Francisco Chronicle* in which he expressed negative opinions about "closet queens," applied for a marriage license with another man, and served as an active member of the Seattle Gay Alliance. Judge Jameson found that although the quiet, private practice of a homosexual lifestyle would be protected, open and public flaunting or advocacy of homosexual conduct would not. Judge Jameson applied the *Pickering* balancing test and found that " . . . the Commission could properly conclude that, under the facts of this case, the interest of the Government as an employer 'in promoting the efficiency of the public service' outweighed the interest of its employee in exercising his First Amendment Rights through publicly flaunting and broadcasting his homosexual activities."[76] Singer's dismissal was thus upheld.

In *Santos v. Miami Region, U.S. Customs Service*, a telephone operator--who was already on ten day suspension for entertaining a female friend during duty hours, disregarding schedules, taking unauthorized leaves, and locking a co-worker in a switchboard closet

against her wishes—was removed after distributing circulars to co-workers, customs brokers, and the general public, charging the Customs Service with manufacturing false charges and maintaining "phantom writings" and "mysterious archives."[77] Judge Bownes, writing for the First Circuit, found that Mario Perez Santos' wild statements could damage the public's confidence in the Customs Service. Judge Bownes applied a *Pickering* balance and found that "[s]uch speech involves matters of little, if any, public concern which might under *Pickering* be deserving of protection. The only effect that Perez' activities could have had was to lessen respect and confidence in the integrity of the Customs Service. The balance definitely tips in favor of the state as an employer promoting the efficiency of the public services."[78]

In sum then, employee speech is held to hurt organizational efficiency when it interferes with discipline; when it destroys the working relationship between superior and subordinate; when it disrupts co-worker harmony; when it occurs in an inappropriate time, place or manner; or when it damages the good name of an organization. While a taxonomy of ways speech can affect organizations is helpful, it does not answer two fundamental questions: First, what standard of proof should be used to determine whether speech has affected efficiency? Secondly, since the efficiency interest is to be weighed against the interest of free speech, how can the degree of inefficiency caused by specific speech acts be determined?

The United States Supreme Court has given no direct guidance in setting standards. It is generally the duty of the trial courts to sort out the trial evidence and to determine the effects, or possible

effects of speech on organizational efficiency. Some Circuits have attempted to lay down guidelines for proving damage to organizational efficiency.

The Fifth Circuit decided that there must be material and substantial interference with the operation of an organization in order to prove damage to efficiency. In the case of *Battle v. Mulholland,* Judge Rivers held that proof that a black policeman's living with two white women " . . . materially and substantially impaired his usefulness as a police officer . . . " was required before the policeman's lifestyle could be causally linked to organizational inefficiency.[79]

Judge Rivers, not finding much guidance in *Pickering,* applied by analogy the rationale found in the Supreme Court's ruling in *Tinker v. Des Moines Independent Community School District.*[80] The *Tinker* case involved school children who were suspended for wearing black armbands in protest of the hostilities in Vietnam.

Judge Rivers, in footnote six, quoted Justice Fortas' majority opinion directly. The passage indicates that Rivers would not automatically equate conflict with inefficiency:

> But, in our system undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a

> disturbance. But our Constitution says we must take this risk . . . ; and our history says that it is this sort of hazardous freedom--this kind of openness--that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society . . . . Certainly, where there is no finding and no showing that engaging in the forbidden conduct would " . . . materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.[81]

The Eighth Circuit, however, offered another interpretation of *Tinker*. Judge Talbot Smith, in *Birdwell v. Hazelwood School District*, ruled that only potential and not necessarily actual disruption need be shown in order to establish an interest in organizational efficiency.[82]

In the case, Beauregard Birdwell, a high school algebra teacher, orally confronted visiting Army recruiters in a school hallway, and told his algebra class that " . . . the student body was 4,000 strong and that at Washington University, the presence of the military visitors would not be tolerated by the students."[83] Judge Smith viewed the statements as a " . . . thinly veiled exhortation to violence" and therefore different than the silent armband protest found in *Tinker*.[84] Judge Smith ruled that "[i]n a situation of potential disruption there is no requirement in the law that the proper authorities must wait for the blow to fall before taking remedial measures."[85]

The D.C. Circuit ruled that a person's statements could not be used as a sign of a poor attitude and therefore an indicator of an inefficient employee. Rather, the Court held that ther must be a specific finding that statements affect efficiency.

In *Tygrett v. Washington,* James Tygrett, a probationary police officer, was dismissed because the police department said that his statements in favor of a "sick-in" indicated a poor attitude.[86] Judge Robinson rejected the poor attitude theory and ruled that " . . . his discharge could be justified only by a specific finding that the statements in question adversely affected his efficiency as a police officer or the efficiency of the police force."[87]

The Second Circuit applied the *Tinker* "material and substantial" doctrine to school regulations concerning mailbox, bulletin board, and meeting room use. The Court ruled that any regulation must be based on reasonable inferences drawn from concrete facts and not on mere fear or apprehension.

In the case of *Federation of Teachers v. Board of Education Members,* a minority union was denied mailbox, bulletin board, and meeting room use.[88] Judge Anderson extended the material and substantial doctrine by ruling that the State must show " . . . that, without the infringing policy or regulation, there would be a substantial and material interference with the requirements of appropriate discipline in the operation of the schools. In making this showing, the administration must rely on reasonable inferences drawn from concrete facts, not on the mere apprehension or speculation that disturbances or interferences with appropriate discipline will occur."[89] Judge Anderson then examined the alternate channels of communication available and found " . . . little or no First Amendment interests at stake . . . ."[90]

The Tenth Circuit adopted a standard that damage to efficiency by speech must be shown to be real and important. In *Key v. Rutherford*, Thomas Key, police chief of Stroud, Oklahoma, was fired for violating a regulation prohibiting him from discussing his complaints with City Council members.[91] Key ignored the prohibition and discussed budget grievances with John Killingsworth, the Mayor of Stroud. Judge Seymour ruled that "since First Amendment interests are at stake, time, manner, place, performance and operational efficiency objections to speech must be real and important before they can serve as a basis for discipline or discharge of a public employee . . . ; it must be determined whether the content of Key's communication to the mayor or its methods of expression significantly interfered with Key's effectiveness as chief of police or with the efficiency of the police department."[92]

The courts have had trouble dealing with the State's interest in organizational efficiency. This is probably due to two factors. First, Justice Marshall, in footnote three of his opinion in *Pickering*, intimated that there might be situations where speech damages efficiency, but he gave no specific guidance beyond that. He said, "We intimate no views as to how we would resolve any specific instances of such situations, but merely note that significantly different considerations would be involved in such cases."[93] The courts were left on their own to establish standards for proof of inefficiency or efficiency. The result has been inconsistency between the Circuits.

The second reason that the courts have had difficulty is that proving that speech causes inefficiency involves formulating two dubious causal links. In most cases, it must be shown that the public employee's speech

affected a superior, a co-worker, or the general public. Then, a second causal link must show that the altered behavior of those people damaged efficiency in some way.

The causal links are often based on the testimony of the very people who might have been offended or threatened by the remarks of the employee. In addition, many courts assume that a poor relationship with a superior, disharmony among co-workers, or a tarnished reputation among the general public is automatically inefficient. In other words, they assume that conflict is always bad and no good can come out of it; a concept that flies in the face of modern thought on organizational conflict.[94]

While the logic of this series causation may seem simple in theory, carefully drawing these causal links in an organizational context, where many factors simultaneously contribute to efficiency or inefficiency, is a herculean task. The multiple causation may well mislead the courts to link inefficiencies to speech which are not caused by speech, and camoflage situations where speech indeed causes inefficiencies.

Even more difficult is determining how much inefficiency was caused by speech, and how much was caused by other factors. Since the speech of one person is often motivated by more widespread dissatisfaction, it is difficult to determine how much damage was caused by speech and how much by general dissatisfaction.

The problem with these troublesome causal links is exacerbated when some courts adopt a position such as the Eighth Circuit's, that potential inefficiencies can be weighed in addition to actual inefficiencies. Under such a standard, the courts must predict what affects the speech would have on people's behavior, and then predict what affects the altered behavior would have on organizational efficiency.

III. BALANCING THE INTERESTS

When Justice Marshall ruled that the public employee's interest in " . . . commenting on matters of public concern . . . " must be weighed against the State's interest in " . . . promoting the efficiency of the public services it performs . . . ," he established an *ad hoc* balancing test.[95] In order to use such a test, judges must not only decide whether the elements of a given case qualify as actual interests on each side of the balance, but must also assign values to those elements and weigh the two dissimilar interests.[96] In the case of public employee speech, a balancing test is difficult to use and can lead to inconsistencies.

The first difficulty in applying a balancing test is establishing the interests to be weighed and assigning a value to them.

On the speech interest side of the balance, the courts must determine how close the speech of a public employee is to being pure " . . . commenting on matters of public concern . . . ," and thus to the " . . . core value of the First Amendment."[97] This difficult task is exacerbated by Justice Rehnquist's refusal, in *Givhan*, to explain whether private communication is as close to core value speech as communication aimed at the general public.

On the organizational efficiency side of the balance, the courts must work without much guidance from the Supreme Court. While the Supreme Court has suggested a few categories of harm which might result from speech, it has given no standard of proof to follow in establishing harm to organizational efficiency. The courts must use a dubious series of causal links to show that speech affects the behavior of organizational

members, and that in turn, this altered behavior harms organizational efficiency.

Once the different sides of the balance have been loaded, the courts must compare two dissimilar values and decide which one is more important. As one might expect, the courts are not consistent.

The consistency problem can best be illustrated by comparing cases where speech outweighed organizational efficiency and cases where organizational efficiency outweighed speech. In the previous section, cases were reviewed where damage to discipline; co-worker harmony; confidentiality; personal loyalty and confidence; time, place and manner problems; and damage to the good name of a public agency outweighed the interest in speech. In this section, cases where speech outweighed harm to organizational efficiency will be presented for comparison. Although the facts of every case are unique, there are enough similarities to compare the way the *Pickering* balance is applied.

In the Tenth Circuit case of *Smith v. Lasee*, speech was found to outweigh harm to discipline. In the case, Melvin Smith--an associate professor at Dixie Junior College, in St. George, Utah--was denied tenure for criticizing the college administration's policies, sponsoring the college's Young Democrats in the support of a candidate for state senate, and reporting faculty criticisms concerning a typing instructor to the Dean of Academic Affairs.[98]

Judge Seth balanced the interests and found that " . . . the plaintiff's exercise of his First Amendment rights in the manner in which he did far outweigh the interest of the defendents in promoting the efficiency and harmony of Dixie College . . . ."[99]

The facts in *Smith* are somewhat different than the facts in *Whitsell v. Southeast Local School District.*[100] There, the Sixth Circuit found the balance in favor of efficiency when a teacher's speech to an unauthorized assembly was viewed as contrary to the principal's efforts to get students to return to classes.

In cases involving co-worker harmony, the distinction between cases where speech is protected and is not protected is less clear. The Eighth Circuit case of *Atcheson v. Siebermann* involved a letter sent to the assistant county attorney by county juvenile probation officer Esther Atcheson. The letter contained allegations that other officers had submitted false mileage reports on their expense sheets. She was fired by supervising juvenile court judge John Seibermann.

Judge Bright applied the *Pickering* balance and ruled that " . . . a public employee's right to speak out on such an important matter must be protected from the threat of retaliatory discharge. As the District Court stated, 'the creation of disharmony cannot be so feared as to silence the critic who would inform the public of this misbehavior of public officials.'"[102] In balancing the interests, Judge Bright cited the district court's finding that there was disharmony in the probation office before the letter was sent and that disharmony would not greatly affect the office because of the independence in the way probation officers work.[103]

In the cases of *Fisher v. Walker* (where a firefighter criticized a union split) and *Janusaitis v. Middlebury* (where a firefighter criticized accounting procedures), the harm to co-worker harmony was found to outweigh the interest in public criticism of the respective fire departments.[104] In these cases, the need for harmony was seen as essential for the operation of fire departments.

The *Pickering* balance has also been applied to minute interests in efficiency and comment. In the Seventh Circuit case of *Yoggerst v. Stewart,* an offhand comment was held not to affect co-worker harmony.[105] In the case, Dorothea Yoggerst, an employee of the Illinois Governor's Office of Manpower and Human Development, was given a letter of reprimand for an off hand comment. "At a time when the news media were announcing the impending termination of the director of GOMAHD, L. W. Murray, . . . Yoggerst made a comment over the telephone to a fellow worker, 'Have you heard the good news?'"[106]

Judge Cudahy applied *Pickering* and ruled that, ". . .some governmental workers approve of their boss and some do not, but a merely casual indication of mild disapproval in a private conversation does not rise to the level of threat to the departmental order or harmony. Here the apparent overreaction . . . seems ludicrous."[107]

Perhaps the most difficult types of cases for the courts to balance are the cases where damage to the superior-subordinate relationship is involved. Unfortunately, these are the cases which occur most often.

In the Fifth Circuit case of *Abbott v. Thetsford,* Denny Abbott, chief probation officer for an Alabama juvenile court, was fired because he filed a discrimination lawsuit on behalf of three minor black children.[108] The suit was filed against the orders of Judge William Thetford of the Family Court of Montgomery County.

Judge Brown, in a curious opinion, ruled that "The proper test for determining the constitutionality of the order must be whether, from an objective viewpoint, the exercise of First Amendment rights disrupts and materially affects the whole operative procedures of the court. Again we stress that nothing in the record shows any disruption or interference

occurred . . . ."[109]

Judge Gerwin, in a dissent, criticized the court for not even considering the superior-subordinate relationship. Judge Gerwin wrote:

> The rationale of the majority is vague, indefinite, uncertain, and ambiguous. It totally overlooks the fundamental requirement of cooperation and confidence between a judge and his chief probation officer in the discharge of vital responsibilities affecting the lives and welfare of dependent and neglected children. Not only was Mr. Abbott's conduct a violation of the principle of cooperative responsibility, trust and confidence, it constituted insubordination and a total disregard for the welfare of Judge Thelford's court.[110]

In the Fifth Circuit case of *Porter v. Califano*, Ella Porter, a clerk-typist for the Southeastern Program Center of the Social Security Administraion, was suspended for thirty days without pay because she distributed a letter sharply criticizing two of her superiors.[111] Judge Goldberg remanded the case to the district court with instructions to apply the *Pickering* balance. Goldberg also suggested that the government could have minimized the harmful effects. He said, ". . .[m]anagement could have familiarized its employees, including new and supervisory, with the management's view of the facts of the controversy."[112] Thus, Goldberg added a new twist to the balance by arguing that management should take other measures to avoid harm to organizational efficiency before that harm can be weighed against First Amendment rights.

The superior/subordinate question has been decided much differently by some courts in cases with similar factual situations. In *Kannisto v.*

the City and County of San Francisco, the harmful effects of personal statements about a superior officer at a police roll call were found to outweigh speech interests.[113] In the case of *Brousseau v. United States*, an employee who merely circulated a petition and made statements in protest of the closing of his department was found to cause greater harm to the superior-subordinate relationship than was justified by his First Amendment interests.[114] Finally, in *Sprague v. Fitzpatrick*, and *Smalley v. City of Eatonville*, the speech of employees who accused their employers of lying was outweighed by harm to the superior-subordinate relationship.[115] It is not easy to distinguish the factual situations between these cases and cases where speech was found to outweigh harm to the superior-subordinate relationship.

Time, place and manner considerations were important in the First Circuit case of *Pilkington v. Bevilacqua*.[116] Robert Pilkington was the administrator of a Rhode Island state mental hospital. He had made a series of criticisms and suggestions for which he was discharged. The First Circuit, in a *per curiam* opinion, held that his speech caused no actual disruption since he utilized administrative channels and administered his hospital as well or better than his colleagues in other hospitals.

However, in *Phillips v. Adult Probation Department*, an objectionable poster was outweighed by place considerations even though there was no evidence of poor job performance.[117] In other cases such as *Duke v. North Texas State University*, *Megill v. Board of Regents of the State of Florida*, and *Adamian v. Lombardi*, the time, place, and manner of employees' speech was held to affect their fitness as employees, even though there speech was not directly connected to job performance.[118] Here again, it is difficult to distinguish factual situations where speech

was protected from factual situations where time, place, and manner considerations outweighed speech interests.

Finally, in *Bernasconi v. Temple Elementary School District No. 3* the good name of the organization was considered.[119] Socorro Hernandez Bernasconi, a school counselor, was transferred because she complained that Spanish speaking " . . . children were being placed in classes for the mentally retarded because they were tested in English rather than in their native tongue."[120] After getting no action through administrative channels, she advised parents to seek legal help. She was transferred to a post where she could not use her educational background.

Judge Ely, applied the *Pickering* balance and ruled that " . . . the School District's interest in being free from general criticism cannot outweigh the right of a sincere, educational councelor to speak out against a policy she believes to be both harmful and unlawful."[121]

In the case of *Long v. Board of Education of the City of St. Louis*, a teacher had a similar motive but the fact that she used school letterhead in a way that might attribute her statements to the school board outweighed her speech interests.[122] In the cases of *McConnell v. Anderson* and *Singer v. United States Civil Service Commission*, homosexuals who pursued open homosexual lifestyles and engaged in active participation in political issues relating to homosexuals, found that embarrassment to their employer outweighed their free speech interests.[123]

The problems of consistency found in the *Pickering* balance are somewhat mitigated by the use of the case by case approach. The courts have an opportunity to sift through the facts and render what they feel is a fair decision.

However, any test with such latitude for interpretation has two distinct disadvantages. First, any employee who contemplates speaking out

must guess what speech, under what circumstances, will be protected and what speech will be outweighed by interests in organizational efficiency. Secondly, it is possible that judges, caught up in the heat of the times, might be biased in the use of the balancing test.

IV. PRESSING FIRST AMENDMENT CLAIMS

In order to pursue First Amendment protections, an employee must prove that he/she was fired because of speech. Because of several Supreme Court decisions during the past decade, establishing that speech was the only reason for retaliation is not an easy matter.

In 1972, the Supreme Court handed down two significant cases. In *Board of Regents of State Colleges v. Roth,* an assistant professor at the University of Wisconsin-Oshkosh was not renewed. Thinking that the action was in retaliation for protected speech, he sued for a hearing on the reasons for his non-renewal.[124]

Justice Stewart, writing for the Court, held that unless there is a Fourteenth Amendment interest in "liberty" or "property," the employee does not have a right to a hearing where reasons for the firing are presented. In other words, absent formal charges or a stigma or disability foreclosing other employment, the employer does not have to furnish reasons for firing a non-tenured professor. If the employee does not have access to statutory protection or a long-term contract, the employee must take on the burden of proving that he/she was punished for speaking out.

In the twin case of *Perry v. Sindermann*, the contract of Robert Sindermann, a professor at Odessa Junior College, was not renewed.[125] Justice Stewart ruled that the lack of contractual or tenure right to reemployment did not foreclose the professor from proving that he was not rehired in retaliation for speech. He also held that where there is a tenure or tenure-like system of retention, the employee is entitled to a hearing where the reasons for non-renewal are presented.

What these decisions mean is that in many cases the employer need not give any reason for firing or otherwise punishing the employee.[126] Under such circumstances, it can be most difficult for an employee to prove that he/she was punished in retaliation for First Amendment speech.

Once the employee has proved that speech was a"substantial or motivating" reason for firing or other punishment, the employer may show, by a "preponderance of evidence," that it would have fired the employee anyway for other reasons.[127]

The standards were not always clear. For example, in the Fifth Circuit case of *Cole v. Choctaw County Board of Education* and the Seventh Circuit case of *Hostrop v. Board of Jr. College District No. 515*, the courts had ruled that firing a person for protected speech was improper even if there were other valid reasons for the dismissal.[128] However, other courts such as the Tenth Circuit in *Abeyta v. Town of Taos* held that an employee could be fired for other reasons even if protected speech was one reason for firing.[129]

The Supreme Court resolved the problem in the 1977 case, *Mt. Healthy City School District Board of Education v. Doyle*.[130] In the case, Fred

Doyle, a teacher, was involved in an argument with another teacher, an argument with school cafeteria employees, swore at students, made obscene gestures to female students, and read a dress code memo from the principal on a local radio call in show. Because the telephone call to the radio show was protected by the First Amendment and was a substantial reason for not rehiring Doyle, the District Court ordered reinstatement with back pay, and the Sixth Circuit Court of Appeals affirmed the decision.[131]

Justice Rehnquist rejected the theory that a reason proscribed by the First Amendment should prohibit an employer from firing an employee for other good reasons. He said:

> We are thus brought to the issue whether,.. . . the fact that the protected conduct played a "substantial part" in the actual decision not to renew would necessarily amount to a constitutional violation justifying remedial action. We think it would not.
>
> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.[132]

Rehnquist went on to explain what standards of proof must be met by the employee in proving retaliation for First Amendment speech and what standards must be met by the employer in proving that the same decision

would have been made anyway.

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"--or to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.[133]

Two years later in *Givhan v. Western Line Consolidated School System*, Rehnquist suggested that a "but for" test be used.[134] Using this test the courts must determine whether an employee would remain employed but for his/her criticism. Thus, the employee must not only face the burden of proving that his/her firing or other punishment was made in retaliation for First Amendment speech but must also give the employer an opportunity to justify the firing for other reasons.

Dismissal is the most common retaliation for protected speech. However, the employee must sometimes show that other, more subtle, retaliations are present. The courts have treated demotion,[135] failure to hire,[136] suspension,[137] letters of reprisal,[138] transfer,[139] pressure to resign,[140] early pregancy temination,[141] and even closing an entire department[142] as possible weapons which can be used in retaliation of protected speech.

V. DISCUSSION

The cases reviewed in this essay illustrate the difficulty the courts face in dealing with employee speech in the wake of the *Pickering* decision. Underlying all of these cases is an important question: Can freeom of speech and organizational efficiency co-exist--and if not, which should be given preference?

In attempting to answer that question, the courts have ruled that, in many respects, free speech in society at large and free speech in organizations are similar. However, the courts have been reluctant to apply identical standards to speech in the society at large and speech in the organization.

In *Pickering* and *Givhan*, Justices Marshall and Rehnquist sought to protect the right of public employees to comment on matters of public concern on the theory that employees take their citizenship, and hence their free speech rights, with them into the public workplace. However, both Justices Marshall and Rehnquist cautioned that in some situations, speech might hurt organizational efficiency and thus hinder the performance of public services. In order to handle these situations, Justice Marshall called for a case by case balancing approach, where possible harms to efficiency are to be weighed against free speech interests.

It is interesting to note that Marshall and Rehnquist also applied more traditional standards as well as the *ad hoc* balancing approach. Justice Marshall suggested that the *New York Times v. Sullivan* test be applied to cases where false statements *per se* were the reason for firing.[143] Justice Rehnquist suggested that time, place, and manner standards be considered.[144] However, both of these tests are to be

applied in addition to, and not as replacements for, Justice Marshall's balancing test.

While a strong analogy might be made between speech in society at large and speech in organizations, the use of the balancing approach means that the protections are far from analogous.

The most telling differences in protection center around the content of speech and the impact that the content has on others. In society at large, "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[145] Government is also restricted from limiting speech on the basis of the content's impact on the speaker's supporters unless it creates a clear and present danger of ". . . imminent lawless action and is likely to incite or produce such action."[146] In addition, government is restricted from limiting speech when a (non-captive) audience is discomforted by a speakers words, unless the words are of such a provocative nature so as to cause violence in the audience.[147] However, when the audience violently objects to the ideas in otherwise peaceful expression, the government is required to attempt to restrain the hostile audience before it is allowed to silence the speaker.[148]

In the *Pickering* balance, the protection afforded speech in organizations is sharply reduced. The courts have balanced such factors such as co-worker harmony, the superior/subordinate relationship, and reflections on the good name of an organization in the eyes of the general public against free speech interests. In other words, the impact on people who feel threatened, unsettled, or just plain annoyed is used as a justification to punish outspoken public employees;

something which is never tolerated in society at large. It is difficult to imagine government punishing speech in society at large which damages co-citizen harmony, the alderman/citizen relationship, or the good name of Illinois.

In society at large, wide open free speech has been praised historically by the Supreme Court as, ". . . the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society . . . ."[149] It is ironic that the courts belive that free speech in society does not necessarily lead to a breakdown in societal discipline, lawbreaking, or anarchy, yet some of the same judges are convinced (or at least fear) that robust free speech will lead to organizational anarchy. The fears of Judge Smith in *Brousseau v. United States* seem to be shared in some degree by other judges. Judge Smith said: "Management cannot function effectively unless it operates 'with one voice' *vis-a-vis* others. For management to countenance disloyalty in such situations would be for management to render itself impotent."[150] These words seem to be a severe response to an employee who peacefully circulated a petition protesting his department's elimination for financial reasons. Judge Smith's statement implies that suppression of speech necessary enhances discipline in organizations. Yet it was Brousseau's lack of power to change the reorganization plans which led him to try to persuade his superiors to change their minds.

If the courts would be willing to extend fully the analogy between free speech in society and free speech in organizations, the troubling *ad hoc* balancing test could be avoided. An alternative would be to apply the traditional standards for speech protection found in society

at large to speech in organizations. In order to do this several modifications would be needed.

The most important modification would be to set up some specific time, place, and manner restrictions. This would free vital organizational functions from disruption, but would protect the content of speech made in innocuous times and places.

In addition, special provisions could be made to prevent disclosures of confidential employment records, pending regulations which might have an effect on stock prices, or any other special need. These could be narrowly drawn; similar to societal prohibitons against disclosing troop ship sailings in time of war.

Maintenance of discipline could be handled by means other than proscriptions on speech. Instead of punishing those who speak out, punishment could be directed toward employees who disobey orders or refuse to work toward organizational goals.

Ultimately, the future of free speech in public organizations is in the hands of the courts. The Supreme Court has suggested an analogy between speech in society at large and speech in organizations but has failed to fully extend that analogy. Instead we are left with an *ad hoc* balancing test which is difficult to use at best and arbitrary at worst.

If we have learned anything from the stormy history of free speech in society, it is that those in power are often quick to silence those with critical or unpopular views. The case review in this study and simple analogy suggest that the same situation exists with those in power in public organizations. The difficult question is: will protection of robust expression from those in power strengthen

the individual organizational member, society, and the organization itself, or will it cause unacceptable harm to the public organization? Up until now, the courts have not come up with a satisfactory answer.

Notes

[1] 29 N.E. 517.

[2] 391 U.S. 563.

[3] For an examination of the theoretical assumptions that have limited the scope of organizational communication research, see: Charles W. Redding, "Organizational Communication Theory and Ideology: An Overview," in Communication Yearbook Three, ed. Daniel Nimmo (New Brunswick, N.J.: Transaction, 1979), pp. 309-41.

[4] USCA Amend 1; The incorporation of the First Amendment into the Due Process Clause of the Fourteenth Amendment makes it in effect, government shall make no law, USCA Amend 14.

[5] The only exception is where "state-action" is shown. However, this applies only to rare instances of government encouraged or government like actions on the part of private organizations; Holodnak v. Avco Corp., Avco Lycoming Division, 514 F.2d 285 (1975); Friends of Yosemite v. Frizzel, 420 F.Supp. 390 (1976); Graseck v. Mauceri, 582 F.2d 203 (1978); Heiskala v. Johnson Space Center Federal Credit Union, 474 F.Supp. 448 (1979); Griffith v. Bell-Whitley Community Action Agency, 614 F.2d 1102 (1980).

[6] However, the loyalty oath cases, especially Keyishian v. Board of Regents of the University of the State of New York, 385 U.S. 589 (1967), have influenced the Court's free speech

decisions; Justice Marshall made specific reference to Keyishian in Pickering v. Board of Education, 391 U.S. 566, 568 (1968).

[7] 391 U.S. 563, 566 (1968).

[8] 391 U.S. 563, 568 (1968).

[9] 391 U.S. 563, 569-70 (1968).

[10] 391 U.S. 563, 574 (1968).

[11] 376 U.S. 254 (1964).

[12] 391 U.S. 563, 574-5 (1968).

[13] 439 U.S. 410 (1979).

[14] 477 F.2d 1164 (1973).

[15] 493 F.2d 1334 (1974).

[16] 464 F.2d 1147, (1972).

[17] 464 F.2d 1147, 1152 (1972).

[18] 520 F.2d 1364, 1368 (1975).

[19] 555 F.2d 1309 (1977).

[20] 439 U.S. 410 (1979).

[21] 408 U.S. 593 (1972); 429 U.S. 274 (1977).

[22] 439 U.S. 410, 414-7 (1979).

[23] 439 U.S. 410, 416 (1979).

[24] 391 U.S. 563, 573 (1968).

[25] 391 U.S. 563, 572 (1968).

[26] 391 U.S. 563, 569-70 (1968).

[27] 439 U.S. 410, 416 (1979).

[28] 484 F.2d 1222 (1973).

[29] 484 F.2d 1222, 1223 (1973).

[30] 464 F.2d 1147 (1972).

[31] 464 F.2d 1147, 1153 (1972).

[32] 464 F.2d 1147, 1150 (1972).

[33] 607 F.2d 17 (1979).

[34] 607 F.2d 17, 18 (1979).

[35] 607 F.2d 17, 26 (1979).

[36] 528 F.2d 750 (1976).

[37] 528 F.2d 750, 754 (1976).

[38] 528 F.2d 750, 756 (1976).

[39] 541 F.2d 841, 842 (1976).

[40] 541 F.2d 841, 844 (1976).

[41] 546 F.2d 560 (1976).

[42] 546 F.2d 560, 565 (1976).

[43] 546 F.2d 560, 565 (1976).

[44] 546 F.2d 560, 565 (1976).

[45] 640 F.2d 765 (1981).

[46] 640 F.2d 765, 766 (1981).

[47] 640 F.2d 765, 768-9 (1981).

[48] 640 F.2d 1235 (1981).

[49] 640 F.2d 1235, 1249 (1981).

[50] 469 F.2d 829 (1973).

[51] 469 F.2d 829, 837 (1973).

[52] 469 F.2d 829, 840 (1973).

[53] 439 U.S. 410, 416 (1979).

[54] 541 F.2d 1073 (1976).

[55] 541 F.2d 1073, 1084 (1976).

[56] 491 F.2d 951.

[57] 491 F.2d 951, 955 (1974).

[58] 491 F.2d 951, 955 (1974).

[59] 608 F.2d 1224 (1979).

[60] 608 F.2d 1224, 1225 (1979).

[61] 608 F.2d 1224, 1228 (1979).

[62] 555 F.2d 1309 (1977); 439 U.S. 410 (1979).

[63] 439 U.S. 410, 416 (1979).

[64] 469 F.2d 829 (1973).

[65] 541 F.2d 1073 (1976).

[66] 608 F.2d 1224 (1979).

[67] 456 F.2d 1058 (1972).

[68] 456 F.2d 1058, 1059 (1972).

[69] 456 F.2d 1058, 1060 (1972).

[70] 456 F.2d 1058, 1060 (1972).

[71] 451 F.2d 193 (1971).

[72] 451 F.2d 193, 194 (1971).

[73] 451 F.2d 193, 196 (1971).

[74] 451 F.2d 193, 196 (1971).

[75] 530 F.2d 247 (1976).

[76] 530 F.2d 247, 256 (1976).

[77] 642 F.2d 21 (1981).

[78] 642 F.2d 21, 25 (1981).

[79] 439 F.2d 321, 325 (1971).

[80] 393 U.S. 503 (1969).

[81] 439 F.2d 321, 325 (1971); 393 U.S. 503, 508-9 (1969).

[82] 491 F.2d 490 (1974).

[83] 491 F.2d 490, 493 (1974).

[84] 491 F.2d 490, 494 (1974).

[85] 491 F.2d 490, 494 (1974).

[86] 543 F.2d 840 (1974).

[87] 543 F.2d 840, 849-50 (1974).

[88] 538 F.2d 471 (1976).

[89] 538 F.2d 471, 478 (1976).

[90] 538 F.2d 471, 482 (1976).

[91] 645 F.2d 880, 888 (1981).

[92] 645 F.2d 880, 885 (1981).

[93] 391 U.S. 563, 570 (1968).

[94] Many organizational scholars see conflict as a natural occurance in organizations and not as something which is good or bad. The way that organizations deal with conflict ultimately leads to efficiencies or inefficiencies. See: Rensis Likert and Jane Gibson Likert, New Ways of Managing Conflict (New York: McGraw, 1976).

[95] 391 U.S. 563, 568 (1968).

[96] The use of the ad hoc balancing test has been heavily criticized by some legal scholars. See the dissents of; Justices Black, Douglas, and Chief Justice Warren in Barenblatt v. United States, 360 U.S. 109 (1959); Thomas Emerson, Toward a General Theory of the First Amendment (New York: Vantage, 1966).

[97] 391 U.S..563, 568 (1968); 391 U.S. 563, 573 (1968).

[98] 485 F.2d 334 (1973).

[99] 485 F.2d 334, 340 (1973).

[100] 484 F.2d 1222 (1973).

[101] 605 F.2d 1058 (1979).

[102] 605 F.2d 1058, 1063 (1979).

[103] 605 F.2d 1058, 1063 (1979).

[104] 464 F.2d 1147 (1972); 607 F.2d 17 (1979).

[105] 623 F.2d 35 (1980).

[106] 623 F.2d 35, 36 (1980).

[107] 623 F.2d 35, 41 (1980).

[108] 529 F.2d 695 (1976).

[109] 529 F.2d 695, 700 (1976).

[110] 529 F.2d 695, 708 (1976).

[111] 592 F.2d 770 (1979).

[112] 592 F.2d 770, 779 (1979).

[113] 541 F.2d 841 (1976).

[114] 640 F.2d 1235 (1981).

[115] 546 F.2d 560 (1976); 640 F.2d 765 (1981).

[116] 590 F.2d 386 (1979).

[117] 491 F.2d 951 (1974).

[118] 469 F.2d 829 (1973); 541 F.2d 1073 (1976).

[119] 548 F.2d 857 (1977).

[120] 548 F.2d 857, 859 (1977).

[121] 548 F.2d 857, 862 (1977).

[122] 456 F.2d 1058 (1972).

[123] 451 F.2d 193 (1971); 530 F.2d 247 (1976).

[124] 408 U.S. 564 (1972).

[125] 408 U.S. 593 (a972).

[126] Shumate v. Board of Education of the County of Jackson,

478 F.2d 233 (1973); Franklin v. Atkins, 562 1188 (1976); Tygrett v. Barry, 627 F.2d 1279 (1980).

[127] Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287 (1977).

[128] 471 F.2d 777 (1973); 523 F.2d 569 (1975).

[129] 499 F.2d 323 (1974).

[130] 429 U.S. 274 (1977).

[131] 529 F.2d 524.

[132] 429 U.S. 274, 285 (1977).

[133] 429 U.S. 274, 287 (1977).

[134] 439 U.S. 410, 417 (1979).

[135] Brousseau v. United States, 640 F.2d 1235 (1981).

[136] Franklin v. Atkins, 562 F.2d 1188 (1977); 639 F.2d 509 (1981).

[137] Porter v. Califano, 592 F.2d 770 (1979).

[138] Aebisher v. Ryan, 622 F.2d 651 (1980); Yoggerst v. Stewart, 623 F.2d 35 (1980); Swilley v. Alexander, 629 F.2d 1018 (1980).

[139] Bernasconi v. Temple Elementary School District, 548 F.2d 857 (1977); Simpson v. Weeks, 570 F.2d 240 (1978); McGill v. Board of Education of Pekin Elementary School District No. 108 of Tazewell County, Illinois, 602 F.2d 774 (1979).

[140] Atcherson v. Siebenmann, 605 F.2d 1058 (1979).

[141] Buckley v. Coyle Public School System, 476 F.2d 92 (1973); Hanson v. Hoffman, 628 F.2d 42 (1980).

[142] D'Andrea v. Adams, 628 F.2d 469 (1980).

[143] 391 U.S. 563, 574-5 (1968); 376 U.S. 254 (1964).

[144] 439 U.S. 410 (1979).

[145] Police Department of the City of Chicago v. Mosely, 408 U.S. 92, 95-6 (1972).

[146] Brandenburg v. Ohio, 395 U.S. 444 (1969); The Supreme Court has had difficulty assigning meaning to the clear and present danger formulation from the time Holmes first presented the test in Schenck v. United States, 249 U.S. 47, 50-1 (1919), to the currently used formulation in Brandenburg.

[147] Chaplinsky v. New Hampshire, 315 U.S. 568, 571-2 (1942).

[148] Gregory v. City of Chicago, 394 U.S. 111 (1969).

[149] Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 508-9 (1969).

[150] 640 F.2d 1235, 1249 (1981).